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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.J., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.A.,

Defendant and Appellant.

E048338

(Super.Ct.No. SWJ007442)

OPINION

APPEAL from the Superior Court of Riverside County. Kenneth Fernandez,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant
and Appellant.

Pamela J. Walls, County Counsel, and Carole A. Nunes Fong, Deputy County
Counsel, for Plaintiff and Respondent.

William D. Caldwell, under appointment by the Court of Appeal, for Minor.

M.A. (the mother) appeals from an order terminating parental rights to her infant son, D.J. She argues that the juvenile court should have applied the “beneficial parental relationship” exception to termination. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) She also appeals from an order made at the same hearing denying her “changed circumstances” petition pursuant to Welfare and Institutions Code section 388 (section 388). We find no error. Hence, we will affirm.

I

GENERAL FACTUAL AND PROCEDURAL BACKGROUND

D.J. was born in May 2007. On the day of his birth, the father was thrown out of the hospital for threatening staff members.

A social worker responded and investigated. She learned that the mother had already failed to reunify with two older children who had been removed from her custody. That previous dependency case had been precipitated by the mother’s physical assaults on other family members, including a five-month-old nephew.

The social worker also learned that, when the mother was three months pregnant with D.J., she had been arrested for assaulting the father. She had been ordered to complete domestic violence classes, but recently she had been rearrested for failing to do so.

The mother admitted smoking methamphetamine and marijuana but claimed that she had stopped using drugs and alcohol when she learned she was pregnant (in her fourth month).

D.J. was detained, and the Riverside County Department of Public Social Services (the Department) filed a dependency petition concerning him. When he was discharged from the hospital, he was placed in a foster home.

In September 2007, at the jurisdictional/dispositional hearing, the juvenile court found jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)) and failure to support (as to the father only) (*id.*, subd. (g)). It formally removed D.J. from the parents' custody, and it ordered that the mother (but not the father) be provided with reunification services.

In September 2008, at the 12-month review hearing, the juvenile court terminated reunification services and set a hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26).

In January 2009, the mother submitted a section 388 petition, and the juvenile court set a hearing on it. In March 2009, at the section 388 hearing, the juvenile court denied the petition. It immediately proceeded to hold the section 366.26 hearing. It found that D.J. was adoptable and that none of the exceptions to termination of parental rights applied. It therefore terminated parental rights.

II

ADDITIONAL FACTS AS SHOWN AT THE HEARING

The evidence before the juvenile court at both the section 388 hearing and the section 366.26 hearing consisted of four specified social worker's reports. In addition, specifically in connection with the section 388 hearing, the juvenile court considered the

original and amended section 388 petitions and a visitation log. At both hearings, it allowed the prospective adoptive mother to comment orally.¹

We limit our review to this evidence, which showed the following.

A. *The Mother's Circumstances.*

The mother was living with the father's grandparents. She was unemployed; however, they paid her \$150 a week for cleaning the home.

In October 2008, the mother completed a substance abuse aftercare program. In the opinion of a program representative, she had benefited from the program and was "a loving mother who deserve[d] to be reunified with her child."

In November 2008, she completed a 52-week anger management program, even though it required a two-hour bus ride each way.

In December 2008, she completed 18 sessions of individual counseling and was discharged. Her therapist, however, recommended that she continue in counseling.

B. *Visitation.*

The mother had supervised visitation with D.J. once a month, for roughly two to four hours. The monitor reported that when D.J. was taken to visits, he was "confused" and "awkward." Once a visit began, it took him "a while to adjust."

¹ The prospective adoptive parents had previously been granted de facto parent status.

During a visit in October 2008, the mother played with D.J.; she hugged and kissed him. However, she disregarded the monitor's advice not to feed him right away because he had vomited in the car on the way to the visit.

A visit in December 2008 reportedly "went well"; however, the mother terminated the visit an hour early.

In January 2009, the parties were at court for a hearing. When the mother and the father approached D.J., he ran to the prospective adoptive parents and said, "Mommy go go."

According to the monitor, "Typically, D[J.] has a difficult time leaving his Foster Mom, he normally cries" During a visit with both the mother and father in February 2009, however, he "went to [the mother] with little hesitation." "It's obvious he knows her and feels comfortable with her." According to the social worker, on the other hand, D.J. looked "scared." The mother asked him if he knew who she was, but he did not reply. She asked him to call her "mommy," but he said "no."

C. *D.J.'s Circumstances.*

D.J. had been with the prospective adoptive parents virtually since birth. They had provided "consistent care, concern and nurturance." They were "very alert [to] his needs and wants" He was "emotionally bonded" with them. He called them "mom" and "dad." He "exhibit[ed] anxiety when he [wa]s separated from them and w[ould] go to them freely for comfort and support."

The prospective adoptive parents already had a three-year-old adopted daughter. D.J. “adore[d]” his foster sister and loved to play with her. He appeared to be secure and happy.

III

THE MOTHER’S SECTION 388 PETITION

The mother contends that the juvenile court erred by denying her section 388 petition.

A. Additional Procedural Background.

In her section 388 petition, the mother asked the juvenile court to vacate the section 366.26 hearing and either to reinstate reunification services or to place D.J. with her.

As changed circumstances, she alleged that she had completed her reunification services plan, including an anger management/domestic violence class and a substance abuse program; that she had completed therapy; and that she had gotten a job and stable housing.

She further alleged that the relief sought would be in D.J.’s best interest because (1) she and other members of her family were visiting D.J. regularly; (2) while in therapy, she had “worked on becoming more self[-]sufficient[] and setting goals”; and (3) she “ha[d] completed the case plan.”

The juvenile court set a hearing on the section 388 petition for the same date and time as the section 366.26 hearing.

In March 2009, at the hearing, the juvenile court admitted documentary evidence offered by the Department and by the mother. The mother's counsel did not ask to call any witnesses or to introduce any additional evidence. Instead, she proceeded to argue the merits. She then stated, "I would submit to the court." The juvenile court heard argument from the other parties as well as rebuttal argument from the mother's counsel. It found that the mother had shown changed circumstances. However, it further found that the relief sought was not in the best interest of the child. It therefore denied the petition.

B. *Analysis.*

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both a "legitimate change of circumstances" and that undoing the prior order would be in the best interest of the child. [Citation.]" (*In re S.J.* (2008) 167 Cal.App.4th 953, 959 [Fourth Dist., Div. Two].) "The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citation.]" (*Id.* at pp. 959-960.)

Preliminarily, the mother contends that the juvenile court erred by failing to conduct an evidentiary hearing on the petition. This argument is frivolous. After the court received the petition, it set a hearing on it. At that hearing, it received all of the evidence that the Department offered. At the request of the mother's counsel, it also

received an attachment to the mother's amended section 388 petition "as . . . additional evidence." When it gave the mother's counsel the floor, she did not ask to call any witnesses or to introduce any other documentary evidence.² Instead, she proceeded to argue the merits of the petition. When she was finished, she stated, "I would submit to the court." Thus, it is apparent not only that the juvenile court held an evidentiary hearing, but also that it in fact admitted all of the mother's proffered evidence.

We turn, then, to the merits.

The juvenile court denied the petition on the ground that the relief sought was not in the best interest of the child. This was not an abuse of discretion. At the time of the hearing, D.J. was nearly two years old. He had spent his entire life with the prospective adoptive parents. He was bonded with them; he became anxious when separated from them. He was also bonded with his prospective adoptive sister.

The mother claims that she, too, had "developed" a "bond" with D.J. The juvenile court could find otherwise. The monitor reported that D.J. was "confused" and "awkward" before visits and took "a while to adjust." Although visits generally went well and D.J. appeared comfortable with the mother, there was no evidence that he became particularly anxious or upset when he was separated from her. When asked to call her "mommy," he refused.

² For this reason, we additionally reject this argument as forfeited by failure to raise it below. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.)

We may assume that the mother has, as she claims, “finally learn[ed] how to be a parent.” Even if so, however, she did not show that returning D.J. to her custody would *benefit* him in any way. “After the termination of reunification services, . . . ‘the focus shifts to the needs of the child for permanency and stability’ [citation]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Those needs could best be met by letting D.J. be adopted by his prospective adoptive parents.

IV

THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION

The mother also contends that the juvenile court erred by failing to find that the “beneficial parental relationship” exception to termination applied.

This “may be the most unsuccessfully litigated issue in the history of law.” (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413.) While it can have merit in an appropriate case (e.g., *In re S.B.* (2008) 164 Cal.App.4th 289, 296-301), this is not even close to being such a case.

In general, at a section 366.26 hearing, if the juvenile court finds that the child is adoptable, it must terminate parental rights. (§ 366.26, subds. (b)(1) & (c)(1).) This rule, however, is subject to a number of statutory exceptions (§ 366.26, subds. (c)(1)(A) & (c)(1)(B)(i)-(c)(1)(B)(vi)), including the beneficial parental relationship exception, which applies when “termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

“When applying the beneficial parent-child relationship exception, the court balances the strength and quality of the parent-child relationship in a tenuous placement against the security and sense of belonging that a stable family would confer on the child. If severing the existing parental relationship would deprive the child of ‘a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.]” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235.)

“‘[F]or the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt.’ [Citation.]” (*In re Jason J.* (2009) 175 Cal.App.4th 922, 938.) “‘A biological parent who has failed to reunify with an adoptable child may not derail adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be *beneficial to some degree*, but that does not meet the child’s need for a parent.’ [Citation.]” (*Id.* at p. 937.)

“The parent contesting the termination of parental rights bears the burden of showing both regular visitation and contact and the benefit to the child in maintaining the parent-child relationship. [Citations.]” (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.) “We must affirm a trial court’s rejection of these exceptions if the ruling is supported by substantial evidence. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th

799, 809.) “We . . . review[] the evidence most favorably to the prevailing party and indulg[e] in all legitimate and reasonable inferences to uphold the court's ruling. [Citation.]” (*In re B.D.*, *supra*, 159 Cal.App.4th at p. 1235.) Because the mother had the burden of proof, we must affirm unless there was “indisputable evidence [in her favor] — evidence no reasonable trier of fact could have rejected . . .” (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 200.)

The mother claims that *she* was “emotionally bonded” to *D.J.* That, however, is not the standard. Rather, the juvenile court must look at whether *he* is bonded to *her*; then it must weigh that bond (if any) against the benefit of adoption by the prospective adoptive parents. In discussing this issue, the mother’s brief does not even mention *D.J.*’s relationship with the prospective adoptive parents — a telling omission.

For the reasons already discussed in part III.B, *ante*, there was no evidence that *D.J.* would be harmed — much less “greatly harmed” — by termination of parental rights. His primary attachment was with the prospective parents. They were the only parents he had ever known. By contrast, the mother was, at best, little more than an aunt or a “friendly visitor.” All of the evidence indicated that *D.J.* would be better off being adopted by the prospective adoptive parents.

V

DISPOSITION

The orders appealed from are affirmed.

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RICHLI
Acting P.J.

We concur:

KING
J.

MILLER
J.